U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8396620

Date: MAY 28, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, which acquires existing firearms manufacturing companies, seeks classification as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that although the record established that the Petitioner satisfied the initial evidentiary requirements, it did not establish, as required, that the Beneficiary has sustained national or international acclaim and is an individual in the small percentage at the very top of the field. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to aliens with extraordinary ability if:

> (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
>
> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
>
> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate sustained acclaim and the recognition of their achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then they must provide sufficient qualifying documentation that meets at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i)–(x) (including items such as awards, published material in certain media, and scholarly articles). The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable material if they are able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)–(x) do not readily apply to the individual's occupation.

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

The Petitioner has employed the Beneficiary as its chief controller officer since December 2017. Previously, the Beneficiary held high-ranking financial officer positions with several companies, mostly in Brazil.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that the Beneficiary has received a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)–(x). The Petitioner claims the Beneficiary meets six criteria, summarized below:

- (ii), Membership in associations that require outstanding achievements;
- (iii), Published material about the alien in professional or major media;
- (iv), Participation as a judge of the work of others;
- (vi), Authorship of scholarly articles;
- (viii), Leading or critical role for distinguished organizations or establishments; and
- (ix), High remuneration for services.

The Petitioner also claimed to have submitted comparable evidence in the form of a letter from an attorney who worked with the Beneficiary on litigation involving the Petitioner. The Director declined to consider this evidence, noting that 8 C.F.R. § 204.5(h)(4) allows consideration of comparable evidence only when the criteria listed at 8 C.F.R. § 203.4(h)(3) "do not readily apply to the beneficiary's occupation." The Petitioner does not reassert this claim on appeal, and therefore we consider the issue to be abandoned.[1]

The Director found that the Petitioner showed that the Beneficiary met the three evidentiary criteria numbered (iv), (vi), and (viii). On appeal, the Petitioner asserts that the Beneficiary meets all six claimed evidentiary criteria.

After reviewing all of the evidence in the record, we find that the Petitioner has established that the Beneficiary meets only two of the criteria, numbered (iv) and (vi).

Because the Director determined that the Beneficiary satisfies three criteria, the denial notice included a final merits determination. We disagree that the record warrants a final merits determination, but will address key issues further below, after addressing the individual criteria.

> *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.* 8 C.F.R. § 204.5(h)(3)(ii)

The scientific director of the National Association of Business Administration Graduate Courses and Research (ANPAD) stated that the Petitioner "has been an associate with ANPAD . . . since August 2004." ANPAD's translated bylaws state:

> Professors, researchers and students of Administration courses and related fields, as well as other[] professionals with an interest in the activities of the Association, in accordance with the approved requirements by a Members' Meeting, may become ANPAD's associated members divided by academic area.

If associate membership is available even to students, as the above passage indicates, then associate membership does not require outstanding achievements.

The Petitioner also submits information about the ANPAD Test, which is used as an admissions test for "graduate courses in Administration and Accounting Sciences." The link between ANPAD associate membership and the ANPAD Test is not explained, and in any case, qualifying for admission to graduate school is not an outstanding achievement.

The Petitioner has not shown that ANPAD associate membership meets the regulatory requirements.

---

[1] *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *see also Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought. 8 C.F.R. § 204.5(h)(3)(iv)

The Beneficiary served as an assessor on an "Undergraduate Paper Defense Committee," evaluating papers submitted by four students at [redacted] University. The Director found that this activity suffices to constitute judging the work of others, and discussed the issue further in the context of the final merits determination.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media. 8 C.F.R. § 204.5(h)(3)(vi)

The record contains copies of several qualifying articles by the Beneficiary. The Director further discussed these articles in the final merits determination.

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation. 8 C.F.R. § 204.5(h)(3)(iii)

The Petitioner submits copies of two scholarly conference papers, each of which cited an article by the Beneficiary among several bibliographical references. The Petitioner contends that the Beneficiary's "extraordinary business expertise has . . . been highlighted and praised directly . . . [and] indirectly in the form of citation references in professional publications." Citations and brief references in scholarly articles do not necessarily mean that the articles are about the Beneficiary, relating to his work in the field.

The Petitioner did not submit English translations of the Portuguese-language articles, as required by 8 C.F.R. §§ 103.2(b)(3) and 204.5(h)(3)(iii). The Petitioner only submitted English translations of the one-paragraph abstracts for each article, and neither of those abstracts mentions the Petitioner. Without translations to establish the context of the citations, the record does not support the Petitioner's claim that the articles are about the Beneficiary, rather than simply naming him as one of many sources of information.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. 8 C.F.R. § 204.5(h)(3)(viii)

The Director found that the Petitioner established that the Beneficiary meets the requirements of this criterion. We disagree.

The Petitioner's chief executive officer (CEO) states that the Beneficiary has authority over the company's financial functions including cash flow, budget, and taxes. The Director determined that the Beneficiary's role is critical for the petitioning entity. We agree with this determination, but the Petitioner has not shown that the company has a distinguished reputation.

The CEO acknowledges that the Petitioner "is a new company . . . built from acquisitions" of companies that had already earned their own reputations. Some of those acquired companies may have distinguished reputations of their own, but the Petitioner has not established the extent to which the Beneficiary has authority over those subsidiaries, as opposed to the holding company that owns them. The CEO asserts that the Beneficiary is "the only Officer in the company after me," suggesting a minimal management structure rather than one that exercises direct and detailed authority over five different manufacturing companies. The Petitioner does not establish that the Beneficiary performs in a leading or critical role for any of the Petitioner's subsidiaries, and therefore the reputations of those companies are immaterial.

"Reputation" is defined as "overall quality or character as seen or judged by people in general"; "recognition by other people of some characteristic or ability"; or "a place in public esteem or regard."[2] These definitions show that a reputation, distinguished or otherwise, derives from outside perception, not from self-assessment. Therefore, the Petitioner cannot establish the reputation of an organization based only on statements from officials of that organization. Information about an organization's reputation must come, instead, from reliable and identified sources outside that organization. (If the sources are not identified, then we cannot account for possible bias or error in the descriptions offered.)

The age and apparent size of the company do not, by themselves, prove or disprove that the Petitioner has a distinguished reputation, but the burden of proof is on the Petitioner to establish eligibility; there is no presumption of distinction. While counsel for the Petitioner has asserted that the Beneficiary's various employers have distinguished reputations, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)).

The Petitioner asserts that the Beneficiary performed in leading or critical roles for his earlier employers as well, but, as above, this claim relies entirely on letters from officials of those companies, with no corroboration that the employers have distinguished reputations. The Beneficiary generally worked for Brazilian subsidiaries of companies headquartered elsewhere. When counsel for the Petitioner discusses the reputations of the companies, that discussion focuses on the companies' headquarters outside Brazil, or on the multinational organizations as a whole, whereas the Beneficiary's roles appear to have been largely confined to subdivisions of those organizations. The Petitioner must establish that the organizations have distinguished reputations at the level of the Beneficiary's roles, rather than relying on the reputations of the employers' parent companies, holding companies, affiliates, etc.

The Petitioner has not established that the Beneficiary has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

> *Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.* 8 C.F.R. § 204.5(h)(3)(ix)

We agree with the Director's finding that the Petitioner has not satisfied this criterion.

[2] https://www.merriam-webster.com/dictionary/reputation (last visited May 4, 2020).

The Petitioner documents the Beneficiary's pre-2018 earnings in Brazil, but does not provide any basis for comparison to show that the figures are high in relation to others in the field.

In terms of the Beneficiary's compensation in the United States, the Petitioner paid the Beneficiary $162,360.61 in 2018. A March 2019 job offer letter from the Petitioner to the Beneficiary specifies a base salary of $145,000 per year plus benefits.

The Petitioner cites three figures on appeal, all deriving from previously submitted documentation:

National Average Salary for Top Executives, according [to] the Bureau of Labor Statistics	Chief Compliance Officer average in [redacted] Arizona, according [to] Linkedin	Beneficiary's salary
US$104,980 per year	US$107,000 per year	US$162,360.61

The Petitioner asserts that the cited figures "clearly show[] that Beneficiary's annual salary of $162,360.61 is high compared to others who are performing similar work, have similar levels of experience, and who work in the same geographical location." These figures, however, are problematic for several reasons.

The "Top Executives" figure comes from the Bureau of Labor Statistics' *Occupational Outlook Handbook*, reporting that the 2018 median pay for "Top Executives" was $104,980 per year. The Petitioner does not adequately explain why this figure applies to the Beneficiary's position. The figure accounts for executives in "both small and large businesses," including "companies in which they are the only employee." The Petitioner does not explain how this very broad category limits comparison to "others who are performing similar work, have similar levels of experience, and who work in the same geographical location" as the Beneficiary.

In contrast, the *Handbook* also has a listing for "Financial Managers," whose duties appear to more closely match those of the Beneficiary. The *Handbook* reports: "In May 2019, the median annual wage[] for financial managers in . . . [m]anagement of companies and enterprises [was $]145,280,"[3] an amount slightly higher than the Beneficiary's 2019 base salary.

The Petitioner states that the sum of $162,360.61 represents the "Beneficiary's salary" for 2018, but his base salary was $145,000 as of March 2019. Either the Petitioner reduced the Beneficiary's salary after 2018, or the higher sum includes additional non-salaried pay such as bonuses and benefits. This is a highly relevant distinction because, otherwise, comparing the Beneficiary's *total* compensation with the *base salary* paid to others would produce a result skewed in the Beneficiary's favor.

The Petitioner derived the LinkedIn data from printouts of private survey data from various websites. The data, however, are inconsistent, relying on non-random surveys with small sample sizes. LinkedIn relied on "15 responses" to report that chief compliance officers in the [redacted] area earn an average annual base salary of $101,000, plus an average $6000 in benefits. The same source reported that, in other U.S. locations, the median annual base salary is as high as $185,000.

[3] https://www.bls.gov/ooh/management/financial-managers.htm#tab-5 (last visited May 5, 2020).

The other submitted sources conflict with one another. PayScale indicates that the national average salary for a chief compliance officer is $120,000. Dice indicates that a corporate controller with 15 years of experience could expect to earn a salary between $81,500 and $113,000 in the United States, with a somewhat reduced range of $77,500 to $107,000 per year in [redacted] Arizona. Glassdoor reports that the national average base pay for a corporate controller is $130,226 per year.

Indeed indicates that the average salary for a corporate controller is $91,245 per year in Arizona, and $152,806 per year in [redacted] If the latter figure represents base pay before benefits (as the word "salary" implies), then the Beneficiary's base salary is below average for the area. An accompanying distribution chart shows that local salaries range between $85,000 and $276,000 per year. But these figures derive from only 16 samples.

The incomplete and conflicting data that the Petitioner has submitted are not sufficient to show that the Beneficiary's compensation meets the requirements of the regulation.

Also on appeal, the Petitioner cites an unpublished appellate decision from 2017. That decision has no precedential authority. Furthermore, the beneficiary's salary was not an issue in the cited case, and the Petitioner does not explain how it is otherwise relevant to the issue of compensation.

B. Final Merits Determination

Because the Director determined that the Petitioner submitted the requisite initial evidence, the Director then evaluated whether the Petitioner has demonstrated, by a preponderance of the evidence, that the Beneficiary enjoys sustained national or international acclaim; that he is one of the small percentage at the very top of the field of endeavor; and that his achievements have been recognized in the field through extensive documentation. A final merits determination involves analysis of a beneficiary's accomplishments and weighing the totality of the evidence to determine if their successes are sufficient to demonstrate that they have extraordinary ability in the field of endeavor. *See* section 203(b)(1)(A)(i) of the Act; 8 C.F.R. § 204.5(h)(2), (3); *see also Kazarian*, 596 F.3d at 1119-20.[4] The Director determined that the Petitioner has not shown the Beneficiary's eligibility.

While we disagree with the Director's conclusion that the Petitioner has met three of the initial criteria, below we will briefly consider key findings from the Director's final merits determination.

As noted above, the Petitioner documented two citations to the Beneficiary's scholarly articles. The Director concluded that the Beneficiary's scholarly articles have had minimal impact on his field.

The Petitioner states, on appeal, that the "Beneficiary's Authorship of Scholarly Articles meets all the requirements under the plain language in the regulations." The Director agreed, and found the

[4] *See also USCIS Policy Memorandum PM 602-0005.1, Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14* 4 (Dec. 22, 2010), https://www.uscis.gov/legal-resources/policy-memoranda (stating that USCIS officers should then evaluate the evidence together when considering the petition in its entirety to determine if the petitioner has established, by a preponderance of the evidence, the required high level of expertise for the immigrant classification).

Beneficiary's scholarly articles deficient only in the context of the final merits determination. In that determination, unlike the initial review of the ten criteria, sustained acclaim is directly at issue. The statute directly requires "sustained national and international acclaim," and the regulations require the Beneficiary to have "risen to the very top of the field." These requirements do not disappear or become irrelevant because 8 C.F.R. § 204.5(h)(3)(vi) does not repeat the phrases. A beneficiary's published scholarly articles *may* result in acclaim, but the act of publication is not, itself, an infallible and irrebuttable hallmark of that acclaim.

In this instance, the Petitioner has not shown that the Beneficiary's articles have had any impact or influence on his field apart from citations in two conference presentations. Because the Petitioner submits no translations to give context to those citations, we cannot determine why the other authors cited the Petitioner's work. And the Petitioner has not established that only influential writers accrue two citations to their work.

While the Director acknowledged that the Beneficiary judged four undergraduate papers, the Director found that the Petitioner did not show that this activity reflects sustained acclaim. A former professor at [redacted] University states that "[t]he judges were chosen based on their knowledge of the subject, their academic qualifications and their professional background," but these traits are not hallmarks of acclaim or extraordinary ability. The Petitioner has not shown that the evaluation of undergraduate student papers is a privilege reserved for those at the top of the field.

The record shows that the Beneficiary has had a successful and consequential career, to the benefit of his various employers. But the record does not show that he has met the very high threshold of sustained national or international acclaim as one among the small percentage at the very top of his field of endeavor.

C. Other Issues

On appeal, the Petitioner states that the prior approval of a nonimmigrant petition for O-1 status relied on "nearly identical" criteria, and that, therefore, the Director cannot justifiably deny the immigrant petition based on essentially the same facts.

The earlier, approved O-1 petition is not before us for review. An adjudicator's fact-finding authority should not be constrained by any prior petition approval, but instead, should be based on the merits of each case.[5] In this instance, the Director articulated the grounds for denial of the petition. The Director was not required to compare the immigrant petition to the earlier nonimmigrant petition and explain why the two petitions had different outcomes. Neither the Director nor the Administrative Appeals Office is required to presume that the earlier O-1 petition was correctly approved.

The Petitioner also asserts that the Director denied due process to the Petitioner, because the denial notice referred to deficiencies that the Director had not previously specified in a request for evidence.

[5] USCIS Policy Memorandum PM-602-0151, *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status* 3 (October 23, 2017), http://www.uscis.gov/legal-resources/policy-memoranda.

A request for evidence is, by nature, the result of a preliminary review of the record rather than an exhaustive evaluation thereof, and the issuance of such a notice is discretionary under 8 C.F.R. § 103.2(b)(8). Because the Director was not required to issue a request for evidence at all, the Director did not violate the Petitioner's right to due process by failing to incorporate a comprehensive list of every deficiency in the record.

III. CONCLUSION

The Petitioner seeks a highly restrictive visa classification for the Beneficiary, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top. U.S. Citizenship and Immigration Services has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994). Here, the Petitioner has not shown that the significance of the Beneficiary's work is indicative of the required sustained national or international acclaim or that it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate that the Beneficiary is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2).

For the reasons discussed above, the Petitioner has not demonstrated the Beneficiary's eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.